

Continental

ORIGINAL



Continental Airlines, Inc. Tel 202 289 6060
Suite 1250
1350 I Street NW
Washington DC 20005

64526

September 22, 1999

United States Department of Transportation Dockets
400 Seventh Street, S.W.
Room – Plaza 40 1
Washington, D.C. 20590

RE: Docket No. FAA- 1999-600 1 - 12
Notice No. FAA 99-14

SEP 24 1999
FAA
WASHINGTON, DC

Dear Sir or Madam:

These comments are submitted to the FAA on behalf of Continental Airlines, Continental Express, and Continental Micronesia (hereinafter collectively referred to as Continental) in response to the Notice of Proposed Rulemaking issued by FAA on July 16, 1999 entitled 'Protection of Voluntarily Submitted Information.'

First, it is important to Continental to understand and appreciate the context of the comments which follow. Continental has a number of different active programs in place designed to review operational data and extract extensive substantive information from on-going daily operations. These programs are not required by FAA regulations, nor by any other governmental agency. They are programs, which were created, designed, developed, and implemented by Continental. We have found these programs to be valuable in a variety of ways, particularly in terms of enabling us to analyze and evaluate our ongoing operations, and then use that analysis to enhance our operational activities by refining our policies practices, and procedures.

By way of illustration, we have a significant and expanding FOQA program, which involves collecting extensive in-flight data from flight operations as a way to better understand standard normal operating parameters as well as identifying and analyzing excursions from those parameters. In addition we have other programs in place which focus on reviewing internally reported non-routine operational events. Our evaluations differentiate among fleet types, and then the information concerning the performance of each fleet is provided to flight operations (i.e., our line chief pilots and training department) and to our technical services staff (i.e., engineering, maintenance, and quality assurance.) We take appropriate steps to ensure that there is a 'cross-over' flow of information between our flight operations and technical services organizations. These processes are an integral part of our internal evaluation and analysis programs.

Much of the information described above as well as other safety related programs and projects, which we have in place, is regularly shared on a reciprocal basis with other air carriers. Through ATA there is an informal program by which we periodically share information and analysis with other air carriers so that we can benefit from their experience and evaluations and they have the opportunity to benefit from ours. At the present time we are cooperating in the development of a project within the Air Transport Association to create an Aviation Safety Exchange System that is intended to develop commonality and would systematize the exchange of safety related information.

However, that is not the end of our commitment to our internal programs intended and designed to enhance safety, programs which are not required by FAA or any other regulatory agency. Our internal safety information and evaluations are routinely and regularly made available to FAA. For example, there is an open invitation to the FAA to attend and participate in our regular FOQA meetings. The FAA is also invited to our quarterly flight operations review which includes chief pilots, assistant chief pilots, and the training department.

With the foregoing providing both context and background, for the reasons described in more detail below, Continental is extremely disappointed with and discouraged by this NPRM as issued by FAA. We believe this NPRM is substantively flawed and presents significant impediments to a formal program of voluntarily providing proprietary information to the FAA, at least as the program is described in this NPRM.

We appreciate the FAA's difficulty in apparently trying to juggle at least three different, somewhat incompatible policies. There is the public policy benefit which would result from the FAA having access to sensitive internal air carrier proprietary safety and security information collected from extensive daily flight operations. The presumption is that this information could assist FAA in developing trend analyses programs as well as other evaluations of many diverse aspects of routine flight operations. A second consideration is described by FAA in the NPRM preamble as "a strong public policy in favor of Federal agencies releasing information to the public." The third policy factor pertains to the use of information by the FAA in its role as enforcer, and the disclosure of information by the FAA to other governmental agencies for them to use as an enforcer. This involves the prosecution of various sanctions ranging from civil penalties to certificate suspension or revocation by FAA, and providing information to the FBI, Inspector General, or other agencies for them to use in a criminal prosecution.*

* At a minimum it is incongruous to envision a program under which data or information would be voluntarily provided to the FAA with the prospect of the FAA or some other government agency then using that information against the provider in a subsequent civil or criminal proceeding. On its face that presents a chilling if not ominous prospect. Such a prospect is an obvious disincentive and discouragement to voluntarily providing FAA with information, particularly since it is information which the FAA is not entitled to receive. Recent actions in which criminal proceedings were initiated against individuals who had cooperated with the FAA and NTSB as part of an accident investigation have already had negative impacts in terms of inhibiting ability to collect information.

It must be kept in mind that the information which is the subject of this NPRM is essentially sensitive, sometimes incomplete, proprietary operational information which is not required to be reported to FAA or to any other government agency. It consists of extensive operational data extracted at substantial cost and effort by Continental (and other air carriers) for internal use in connection ongoing internal company programs. It must also be kept in mind that Continental (and we believe other air carriers as well) already provide the FAA with access to the safety related information produced by programs such as FOQA and ASAP, and do so on an on-going, albeit informal, basis.

In the preamble discussion of this NPRM the FAA says that it considers the cost to the public from having this data or information protected from public disclosure to be negligible since the data and/or information is not now available to the public, and there would be a benefit to the FAA in having this sensitive proprietary safety and security information voluntarily provided to the agency. We agree with this assessment. It appears, however, that the regulatory structure proposed by the FAA in this NPRM rejects this assessment since this NPRM would not protect data or information voluntarily submitted to FAA from disclosure and the information provided would be used by FAA in its role as enforcer and prosecutor.

Section 193.5 would provide protection only in circumstances where the FAA decided to make an affirmative finding to protect information submitted to the agency. It appears that this finding would be made by FAA on a post-hoc basis, after the agency has the information in its possession. Then before deciding whether to protect the information submitted the FAA would engage in a bureaucratic process involving five preconditions before the agency would make a finding that the information would be protected from disclosure. [see § 193.5(b)(1) – (5)] Associated with making those findings there appear to be a number of other procedural hurdles that must be satisfied before a finding to protect the information would be made. [see § 193.93 On the other hand, however, under the proposed rule there are no preconditions or procedural prerequisites applicable to disclosure, and FAA may disclose the voluntarily provided information for any of a wide variety of reasons. [see § 193.71 The application of all these factors and the decision whether to withhold or to disclose would rest exclusively within the discretion of the FAA.

It is our impression based on carefully reading the proposed rule and the associated preamble that the FAA has chosen to not provide protection from disclosure to voluntarily provided information and to give greater weight to the general policy in favor of releasing information and the disclosure of information. This orientation is apparent from the FAA discussion of this NPRM describing the fact that the FAA reserves the exclusive right and power to make any and all decisions with respect to disclosure or non-disclosure. FAA and FAA alone would have total and exclusive discretion to decide whether or not sensitive proprietary information voluntarily provided to the agency did or did not comply with or satisfy the various circumscriptions and preconditions of § 193.5.

Moreover, according to the NPRM because of the strong public policy in favor of disclosure, the authority to grant protection to information by deciding to not disclose it is reserved to senior agency officials, but the power to withhold that protection and disclose

information would be delegated and re-delegated to virtually anyone at any level within the FAA. We are not sanguine about relying on uncertain future ad hoc determinations.

We would have preferred to see a regulatory requirement or at a minimum a strong presumption in favor of protection of voluntarily provided data and information. Such a rule would have precluded any disclosure of this data or information to anyone, including other governmental agencies, and would have limited access to it to designated persons within the FAA using it for designated valid and legitimate analytical purposes. The FAA could have applied this presumption to all information and data voluntarily submitted, and established a corollary two stage requirement that: first, any person other than designated FAA analysts, including any other governmental agency, seeking access to this data or information would have to demonstrate both a substantial need for that access and an inability to obtain the information in any other way; and second, that before any such access was granted the procedures outlined in the proposed rule related to a subpoena would be applied providing the person who had voluntarily submitted the data or information with notice and an opportunity to object to such disclosure. [see § 193.5(f)] This would be far more consistent with the FAA's purported objective of crafting a rule "to furnish a way for people to provide information to the FAA for safety or security purposes, yet protect the information from disclosure to others."

The proposed rule goes far beyond the bounds of this stated objective, and in doing so appears to present a conundrum. The NPRM ostensibly involves the non-disclosure of data or information voluntarily provided to FAA. The disclosure or non-disclosure of information in the possession of the FAA is basically governed by the Freedom of Information Act (FOIA). At the present time, as described earlier in these comments and as the FAA acknowledges in the preamble to this NPRM, the FAA already has access to much if not all of the most sensitive internal proprietary safety data and information gathered by Continental (and we assume by other air carriers as well.) The limitation is that the FAA inspectors are not authorized to remove copies of that data or information. The reason for this limitation is the protection of the data. Since the FAA does not have possession of this data or information it is not susceptible to FOIA. This limitation also protects the data from being used for purposes other than safety analysis.

In the preamble to the NPRM the FAA indicates that not having a copy of the data "severely limits the ability of the FAA to use the information in agency decision making." Continental is not aware of these undefined and undisclosed "severe limits" on the FAA. While it is true that Continental does not provide the FAA with copies of this internal proprietary information, it is also true that Continental has not placed limits on the ability of the FAA to use the information provided to the agency in connection with any safety evaluation such as trend analysis or the isolation of a potential safety issue and the development of policies and procedures designed to deal with that issue. It may be that by protecting the data in this way the FAA's ability to engage in enforcement decision making is inhibited, but we do not consider that to be an unreasonable or inappropriate limitation on the FAA's ability to engage in decision making.

We recognize that in the context of a creating a regulatory structure that the FAA had to make choices. We are disappointed that the FAA has not focused on and elevated the

public policy benefit which we thought the FAA believed would flow from the FAA having access to sensitive proprietary safety and security information accrued from extensive daily flight operations. It has been our experience with our internal programs as well as our cooperative industry programs that they have enabled us to develop new and revised policies, practices, and procedures as well as assisting us in designing focused actions to enhance aviation safety. The choices made by the FAA reflected in this NPRM are factors in our negative perception of and objection to this NPRM, and our related reluctance to endorse this FAA program as presented.

In addition to the problem with FAA not protecting voluntarily provided information from disclosure, the other negative aspect and basis for our objections to this NPRM was described earlier in our comments about the uses which FAA intends to make of voluntarily provided data and information. The FAA describes its position on this subject in the NPRM - the agency intends to use voluntarily provided internal information in connection with what it views as the agency's law enforcement role, including its surveillance activity, its civil enforcement activity, and possible referral to other agencies for action by them including possible criminal prosecution

It was Continental's understanding that the reason the FAA was interested in obtaining access to the various sets of internal proprietary data and information such as is gleaned from FOQA was to utilize a systems approach in analyzing the data and information as a way to identify trends, discover anomalies, and apply that information in the formulation of safety policy. We consider these other uses to which the FAA expects and intends to apply the information which the agency would like to have voluntarily provided to be inappropriate and clearly inconsistent if not in conflict with those stated goals.

We are disappointed and disheartened by the FAA's apparent decision to take voluntarily provided sensitive proprietary internal information and use it as a vehicle for surveillance and in connection with various prosecutions. It appears that the FAA is more interested in using this information as a tool in applying its enforcement 'sledge-hammer' instead of utilizing what could be extraordinary access to voluntarily provided internal sensitive proprietary information as a safety enhancement tool, applying a systems analysis approach in order to identify trends, discover anomalies, and to then apply that information in the development and formulation of safety policy and broad based enhancements to aviation systems.

Nevertheless, despite the concerns and reservations outlined above, based on our experience Continental continues to believe in the value of the various information collection programs we have in place and those which we may develop in the future. Data and information collected in the course of FOQA, ASAP and other programs have provided us with valuable information and insights which we are reluctant to lose. ^φ


^φ Beyond the disincentive referred to earlier, the proposed course of action outlined by the FAA in this NPRM may have the counter-productive effect of shutting down the flow of data and information from programs such as FOQA. These programs require the active support of various professional groups such as pilots and mechanics. Agreements between Continental and these groups related to these programs are predicated on the existence and continuation of "protective provisions" which are acceptable to and satisfy all parties to these agreements. If such "protective provisions" are not in place or were to be compromised,

While we believe the FAA program described in this NPRM is significantly and substantively flawed, we also recognize that there is the potential for a broad public benefit if the FAA were to have access to at least some of this internally collected proprietary information.

Continental appreciates the FAA's candid indication in the preamble to the NPRM that the agency is not clear on how to best structure programs involving voluntarily provided information. The concept described in the preamble and outlined in the NPRM of developing tailored programs [see §193.93 presents an interesting approach which may provide a vehicle for providing the FAA with some access to portions of the information collected. It may be possible to design and develop an appropriately structured tailored program which could be used to provide FAA with de-identified aggregated information on a periodic basis involving specific, perhaps targeted, operational parameters (e.g., speed and flap setting at various points on approach differentiated by aircraft type and perhaps by specific airport runway; speeds and rotation rates on takeoff; aircraft trim configurations; etc.. .) It may be that this access could be provided through the ATA Aviation Safety Exchange Program currently under development. In our view this 'tailored program' concept warrants further description and explanation by FAA.

Continental appreciates the opportunity to provide the FAA with its comments and views on this subject and anticipates continuing to work cooperative with FAA, other air carriers, and all other members of the aviation community on this and other programs designed to enhance aviation safety.

Very truly yours,



Leonard A. Ceruzzi

Managing Attorney – Regulatory Affairs

these agreements provide for and could result in the termination of these programs in 30 days by a simple notice letter.